Before the
OFFICE OF MANAGEMENT AND BUDGET
and the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Information Collection Being Submitted for Review and Approval to the Office of Management and Budget, 78 Fed. Reg. 73861	)	OMB Control No. 3060-XXXX
	)	
Special Access Rates for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593

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PAPERWORK REDUCTION ACT COMMENTS OF BT AMERICAS, CBEYOND, EARTHLINK, INTEGRA, LEVEL 3, AND TW TELECOM

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January 8, 2014

TABLE OF CONTENTS

Page

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In the Matter of	)	
	)	
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BT Americas Inc. ("BT"), Cbeyond Communications, LLC ("Cbeyond"), EarthLink, Inc. ("EarthLink"), Integra Telecom, Inc. ("Integra"), Level 3 Communications, LLC ("Level 3"), and tw telecom inc. ("tw telecom") (collectively, the "Joint Commenters"), through their undersigned counsel, hereby submit these Paperwork Reduction Act ("PRA") comments in response to the December 9, 2013 Federal Register *Notice* regarding the Federal Communications Commission's ("FCC's" or "Commission's") "Comprehensive Market Data Collection for Interstate Special Access Services."[1]

[1] *See Information Collection Being Submitted for Review and Approval to the Office of Management and Budget (OMB)*, 78 Fed. Reg. 73861 (Dec. 9, 2013) ("*Notice*" or "*PRA Notice*").

I. INTRODUCTION AND SUMMARY

The Joint Commenters include both purchasers and providers of special access services, and as such, they will be required to respond to the proposed information collection if it is approved. While the proposed special access data collection imposes a burden on the Joint Commenters and other industry participants, the collection is necessary for the proper performance of the FCC's functions and will be of practical utility. Collection of the requested data, including the pricing data, will enable the Commission to perform one of its "core" functions—ensuring that large incumbent local exchange carriers ("LECs"), the dominant providers of special access services, provide those services at rates, and on terms and conditions, that comply with the bedrock consumer protection provisions of the Communications Act (the "Act"). Moreover, the FCC has (1) provided an estimate of the average hourly burden posed by the collection that is generally accurate, and (2) taken a number of steps to significantly reduce the burden on respondents (including small entities) to the extent practicable and appropriate, as required by the PRA.

In all events, the burden of the proposed collection is justified by its practical utility. Indeed, as the FCC recognizes in its *Supporting Statement*, the agency already tried regulating incumbent LECs' special access services based on predictions rather than "data-driven analysis," and the result has been "'real harm to American consumers and businesses' and a hindrance to 'investment and innovation.'"[2] The agency has repeatedly stated that it cannot remedy these harms without obtaining comprehensive data on the current market for special access services.

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[2] *See* Federal Communications Commission, Supporting Statement A, *Comprehensive Market Data Collection for Interstate Special Access Services*, OMB Control No. 3060-XXXX, at 8 (Dec. 2013), *available at* http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201311-3060-001 ("*FCC Supporting Statement*") (internal citation omitted).

Therefore, OMB should promptly approve the information collection and allow the Commission to proceed with comprehensive special access reform.

II. BACKGROUND

A. Sections 201 and 202 of the Communications Act.

Section 201(b) of the Act requires that common carriers provide interstate communications services—including special access services—at rates, and on terms and conditions, that are "just and reasonable."[3] Under Section 202(a) of the Act, common carriers must also provide these services at rates, and on terms and conditions, that are not "unjust[ly] or unreasonabl[y] discriminat[ory]."[4] Both Congress and the FCC have recognized that Sections 201 and 202 are "core" provisions of the statute.[5] Indeed, these provisions "lie at the heart of consumer protection under the Act."[6]

B. The Importance of Special Access Services.

As the FCC has recognized, special access services "play a critical role in our [nation's] economy."[7] Special access services are dedicated transmission circuits that, among other things, allow businesses and other entities to connect to each other and to the nation's voice and data networks. For example, multi-location businesses and institutions, such as retail chains, banks, hospitals, and universities, use special access services to connect and securely send large

[3] 47 U.S.C. § 201(b).

[4] *Id.* § 202(a).

[5] *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 16857, ¶ 15 (1998) ("*PCIA Forbearance Order*").

[6] *Id.*

[7] *Special Access for Price Cap Local Exchange Carriers*, Report and Order, 27 FCC Rcd. 10557, ¶ 2 (2012) ("*Pricing Flexibility Triggers Suspension Order*").

quantities of data (such as inventory information, credit card transactions, and customer, patient, or student records) between their multiple stores, branches, and campuses. These entities also use special access services to connect to the Internet and to long distance networks. As one economist has described it, "[s]pecial access is to the information economy what highways and other transportation infrastructure are to manufacturing industries . . . ."[8]

C. Types of Special Access Services and the Regulatory Framework Governing These Services.

There are two major types of special access services. The first category is "circuit-based" special access services. These include "DS1" and "DS3" services, which comprise the vast majority of the special access services used to serve business customers in the United States. DS1 and DS3 special access services offered by the largest incumbent LECs are subject to either (1) the FCC's "price cap" regulations (which are designed to limit the prices incumbent LECs charge for special access services), or (2) the FCC's "pricing flexibility" regulations, which have provided partial or full relief from price cap regulation in geographic areas where the incumbent LEC has met certain "competitive triggers" that are supposed to serve as a proxy for competition.

The second category of special access services is "packet-based" special access services. These include Ethernet services, which are being demanded by an increasing number of business customers. The FCC has largely deregulated the Ethernet and other packet-based services offered by the largest incumbent LECs (namely, the Bell Operating Companies—AT&T, Verizon, and legacy Qwest, which is now CenturyLink). Consequently, while the vast majority

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[8] Lee L. Selwyn *et al.*, Economics and Technology, Inc., *Special Access Overpricing and the U.S. Economy: How Unchecked RBOC Market Power is Costing U.S. Jobs and Impairing U.S. Competitiveness*, at ii (Aug. 2007), *available at* http://apps.fcc.gov/ecfs/document/view?id=6519610372 ("*Special Access Overpricing and the U.S. Economy*").

of these special access services remain subject to Sections 201 and 202 of the Act, they are free of any other pricing regulation.

D. Providers and Purchasers of Special Access Services.

AT&T, Verizon, and CenturyLink provide the vast majority of special access services in the United States.[9] This is because, by virtue of their historical monopolies, these incumbent LECs own the only last-mile wire connection—connections which are needed to provide special access services—into the vast majority of the business customer locations in the U.S.[10] Competitive carriers provide services, including special access services, over their own fiber connections to businesses wherever it is economically feasible to do so. However, as the FCC has recognized, competitive carriers face steep economic and operational barriers to constructing their own last-mile connections (also known as last-mile "facilities") to businesses.[11] As a result, competitive carriers such as the Joint Commenters often have no choice but to purchase special access services from the incumbent LECs at wholesale in order to serve their business customers.

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[9] For example, the two largest incumbent LECs (AT&T and Verizon) "control more than 80 percent of a special access market that is estimated to exceed $15 billion annually." *See Dan Hesse Remarks at Competitive Carriers Association Global Expo*, Apr. 18, 2013, *available at* http://newsroom.sprint.com/executive-team/executive-speeches/dan-hesse-remarks-at-competitive-carriers-association-global-expo.htm.

[10] *See* Petition of Ad Hoc Telecommunications Users Committee, BT Americas, Cbeyond, Computer & Communications Industry Association, EarthLink, MegaPath, Sprint Nextel, and tw telecom to Reverse Forbearance from Dominant Carrier Regulation of Incumbent LECs' Non-TDM-Based Special Access Services, WC Dkt. No. 05-25, at 42-44 (filed Nov. 2, 2012) ("Petition to Reverse Forbearance") (discussing the relevant findings made by the FCC, the Department of Justice, and the Government Accountability Office between 2005 and 2010).

[11] *See id.* at 46-48 (discussing the FCC's findings that competitive carriers face large fixed and sunk costs as well as substantial operational barriers in constructing their own fiber transmission facilities to business customer locations).

E. The FCC's Failure to Ensure that Incumbent LECs' Provision of Special Access Services Complies with Sections 201 and 202 of the Act.

Because they have "control of [the] bottleneck facilities"[12] needed to provide special access services, the largest incumbent LECs have market power in the provision of these services. Incumbent LECs have exploited this market power by charging unreasonably high rates for special access services and offering such services on unjust and unreasonable terms and conditions for more than a decade. In 2002, AT&T—then a competitive carrier and a large purchaser of special access services from incumbent LECs—petitioned the FCC to open a rulemaking proceeding to reform regulation of incumbent LECs' special access services.[13] AT&T argued, among other things, that (1) "the Bells' special access rates are grossly excessive and unlawful and are becoming more so,"[14] (2) "the Bells' unlawful special access rates are having severe and growing anticompetitive effects,"[15] and (3) Sections 201 and 202 of "the Communications Act *compel[]* prompt elimination of these ongoing Bell market power abuses."[16]

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[12] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area,* Memorandum Opinion and Order, 25 FCC Rcd. 8622, ¶ 5 (2010) ("*Phoenix Order*").

[13] *See* AT&T Corp., Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593, at 1 (filed Oct. 15, 2002).

[14] *Id.* at 7.

[15] *Id.* at 16.

[16] *Id.* at 34 (emphasis in original).

In response, in January 2005, the Commission "initiated a broad examination of what regulatory framework to apply to [incumbent] LECs' interstate special access services."[17] The Commission sought comment on, among other issues, (1) the effectiveness of its price cap rules as well as its pricing flexibility rules for DS1 and DS3 special access services,[18] (2) "the proper regulatory treatment of [packet-based] services,"[19] and (3) the terms and conditions on which incumbent LECs sell their special access services.[20] The FCC recognized the need for expedited action with regard to special access pricing in particular and committed to adopting interim relief by July 1, 2005, "to ensure [that] special access . . . rates remain just and reasonable while the Commission considers the record in this proceeding."[21] The FCC never adopted that interim relief. Nor has the Commission adopted comprehensive special access reform. This failure to adequately regulate the rates, terms, and conditions on which incumbent LECs provide special access services has allowed the incumbents (including AT&T, which was acquired by a Bell Operating Company in November 2005) to continue exploiting their market power in the provision of such services.

Given the importance of special access services to the U.S. economy, it is not surprising that incumbent LECs' excessive special access prices and patently unreasonable terms and

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[17] *See Special Access for Price Cap Local Exchange Carriers*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd. 16318, ¶ 8 (2012) ("*Special Access Data Collection Order*" or "*Special Access Data Collection Order and FNPRM*") (citing *Special Access Rates for Price Cap Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 1994, ¶ 1 (2005) ("*2005 Special Access NPRM*")).

[18] *2005 Special Access NPRM* ¶ 4.

[19] *Id.* ¶ 52.

[20] *Id.* ¶¶ 114-125.

[21] *Id.* ¶ 131.

conditions[22] have inflicted substantial harm on the economy. In fact, overpricing of incumbent LEC special access services has diminished investment, stifled innovation, and suppressed competition in the business broadband market, and in the process, has deprived American businesses and consumers of billions of dollars in economic output and hundreds of thousands of jobs.[23] In the absence of FCC special access reform, these harms continue today.

F. The FCC's Adoption of the Special Access Information Collection.

The FCC's primary justification for delay in completing the special access rulemaking proceeding and adopting comprehensive special access reform has been lack of "an evidentiary record that is sufficient to evaluate current conditions in the special access market."[24] Between

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[22] *See, e.g.*, Comments of BT Americas, Cbeyond, EarthLink, Integra, Level 3, and tw telecom, WC Dkt. No. 05-25, at 3-6 & 20-47 (filed Feb. 11, 2013) (describing (1) how incumbent LECs induce customers to buy special access services under purchase arrangements that contain anticompetitive terms and conditions (*i.e.*, loyalty and tying provisions) that violate Section 201(b) of the Act, and (2) how these exclusionary, lock-up special access purchase arrangements harm competition and consumer welfare); *see also* Reply Comments of BT Americas, Cbeyond, EarthLink, Integra, Level 3, and tw telecom, WC Dkt. No. 05-25, at 5-13 (filed Mar. 12, 2013).

[23] *See generally Special Access Overpricing and the U.S. Economy*; *see also* Susan M. Gately & Helen E. Golding, S.M. Gately Consulting LLC, *The Benefits of a Competitive Business Broadband Market*, at ii (Apr. 2013), *available at* http://thebroadbandcoalition.com/storage/benefits-of-broadband-competition.pdf (finding that prompt adoption of special access reform and other "policies that fix the known shortcomings in the present regulatory structure can be expected to stimulate the hiring of as many as 650,000 new employees into the ranks of the telecom sector over the next five years and the investment of an additional $184-billion in private funds into U.S. telecommunications networks"); Stephen E. Siwek, Economics Incorporated, *Economic Benefits of Special Access Price Reductions*, at 3 (Mar. 2011), *available at* http://apps.fcc.gov/ecfs/document/view?id=7021034406 (finding that "a 50% reduction in [s]pecial access prices would result in a $20-$22 billion increase in U.S. output, a $4.4-$4.8 billion increase in employee earnings, an increase of between 94,000 and 101,000 jobs and an increase in value added to the U.S. economy of between $11.8-$12.4 billion").

[24] Opposition of Federal Communications Commission to Petition for Writ of Mandamus, *In re COMPTEL*, No. 11-1262, at 1 (D.C. Cir. Oct. 6, 2011) ("FCC Mandamus Opposition Brief"); *see also Special Access Data Collection Order* ¶ 69 ("[T]here is insufficient evidence in the record upon which to base general or categorical conclusions as to the competitiveness of the special access market.").

2005 and 2011, the Commission repeatedly sought and received (1) input from industry participants on how it should reform its regulatory regime for special access services; and (2) data regarding the special access market from incumbent LEC and competitive providers as well as purchasers of such services.[25] Yet, the Commission still believes that it lacks the requisite data to conduct reform. Indeed, in response to a 2011 petition for a writ of mandamus to conclude the long overdue special access rulemaking, the FCC told the D.C. Circuit Court of Appeals that it can "make no decisions about revising its special access rules [until] it has compiled and analyzed an adequate evidentiary record."[26] The largest incumbent LECs have concurred with the Commission's view and repeatedly called for the agency to undertake a comprehensive information collection effort in this proceeding.[27] As AT&T and other incumbent LECs have put it, the Commission cannot "grant relief first and collect data afterwards."[28]

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[25] *See* Reply of Petitioners in Support of Petition for Writ of Mandamus, *In re COMPTEL*, No. 11-1262, at 5 (D.C. Cir. Oct. 19, 2011).

[26] FCC Mandamus Opposition Brief at 7.

[27] *See, e.g.*, Letter from Jeffrey S. Lanning, Assistant Vice President – Federal Regulatory Affairs, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 1 (filed July 25, 2012) ("support[ing] the idea that the Commission should issue a mandatory data request in the special access docket to develop a full understanding of markets for [special access] services"); Letter from Donna Epps, Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 1 (filed July 31, 2012) ("The Commission needs to receive data from all participants in the marketplace for [special access] services, including cable companies and other providers that are offering competitive alternatives to ILEC special access. The Commission should be explicit in its data request that responses are mandatory and that there will be remedies for those that do not respond."); Letter from David L. Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 11 (filed Mar. 28, 2012) (arguing that "if the Commission is determined to move forward with this rulemaking proceeding, it should promptly issue new data requests").

[28] Reply Comments of AT&T Inc., WC Dkt. No. 05-25, at 49 (filed Mar. 12, 2013) ("AT&T Reply Comments"); *see also* Reply Comments of Verizon and Verizon Wireless, WC Dkt. No. 05-25, at 25 (filed Mar. 12, 2013) ("Verizon Reply Comments") ("The Commission should not

Consistent with its stated need for additional information to resolve the special access rulemaking proceeding, the FCC ultimately adopted a comprehensive mandatory data collection in December 2012.[29] The Commission delegated authority to its Wireline Competition Bureau ("Bureau") to "amend the data collection based on feedback received through the PRA process."[30] In an effort to reduce the burden on would-be respondents, the Bureau took into account their PRA comments and made numerous modifications to the data collection in September 2013.[31]

III. DISCUSSION

A. The Proposed Information Collection is Necessary for the Proper Performance of the FCC's Functions.

In the *PRA Notice*, the Commission seeks comment on "whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information [will] have practical utility."[32] In determining whether the requested information will have "practical utility" under the PRA, OMB will "take into account whether the agency demonstrates actual timely use for the information . . . to carry out its functions."[33] The proposed information collection will be of practical utility to the Commission

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regulate before completing its data collection and analysis."); Reply Comments of CenturyLink, Inc., WC Dkt. No. 05-25, at 18 (filed Mar. 12, 2013) ("CenturyLink Reply Comments") ("The Commission is exactly right: it should not and may not intervene further in this marketplace until after it has collected and analyzed all relevant data.").

[29] *See generally Special Access Data Collection Order*.

[30] *Id.* ¶ 52.

[31] *See generally Special Access for Price Cap Local Exchange Carriers*, Report and Order, 28 FCC Rcd. 13189 (WCB 2013) ("*Data Collection Implementation Order*").

[32] *See PRA Notice* at 73861; *see also* 44 U.S.C. § 3506(c)(2)(A)(i).

[33] 5 C.F.R. § 1320.3(*l*).

in performing one of its primary functions—enforcing Sections 201 and 202 of the Communications Act.

As discussed above, the FCC has a duty to ensure that incumbent LECs provide special access services at rates, and on terms and conditions, that are just and reasonable and not unjustly or unreasonably discriminatory pursuant to Sections 201(b) and 202(a) of the Act, respectively. The Commission enforces these statutory provisions by defining practices that run afoul of carriers' obligations via rulemakings—such as the special access rulemaking proceeding—and via case-by-case adjudications.[34] Enforcement of these statutory provisions is central to the Commission's consumer protection function.[35] As the FCC has held, "Sections 201 and 202, codifying the bedrock consumer protection obligations of a common carrier, have represented the core concepts of federal common carrier regulation dating back over a hundred years."[36]

The proposed data collection will enable the FCC to determine whether incumbent LECs' special access rates, terms, and conditions comply with Sections 201 and 202. In particular, the collection will allow the Commission to conduct a "multi-faceted market analysis of the special access market designed to determine where and when special access prices [as well as terms and conditions] are just and reasonable."[37] A key component of this multi-faceted market analysis is a "structural market analysis"[38] (also known as a market power analysis). Under longstanding

[34] *See PCIA Forbearance Order* ¶ 15.

[35] *See id.* ¶¶ 15-18.

[36] *Id.* ¶ 15.

[37] *Special Access Data Collection Order* ¶ 67.

[38] *Id.* ¶ 71.

FCC precedent, firms with substantial and persisting market power[39] have the incentive and ability to charge rates that are unreasonably high and/or unreasonably discriminatory in violation of Sections 201(b) and/or 202(a) of the Act.[40] In order to determine whether incumbent LECs have market power in the provision of special access services and are exercising that market power by charging rates that are unreasonable or unreasonably discriminatory in violation of these statutory provisions, the Commission must define the relevant product and geographic markets and assess the level of incumbent LEC market power in those markets.[41] Under this market power analysis, the FCC examines a number of factors including, among others, market shares of the relevant participants, the likelihood of potential competitive entry into the market, the level of demand elasticity (*e.g.*, the willingness and ability of an incumbent LEC's customers to switch to another carrier in response to a change in price), and the cost structure, size and resources of the incumbent LECs.[42] As discussed below, the information sought in the proposed collection will be of practical utility in conducting this market power analysis as well as the other aspects of the larger multi-faceted market analysis.

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[39] The Commission has defined "market power" as the "power to control price." *See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, First Report and Order, 85 F.C.C.2d 1, ¶ 54 (1980) ("*Competitive Carrier First Report and Order*").

[40] *See, e.g.*, Final Answer Brief of Respondents, *Qwest Corp. v. FCC*, No. 10-9543, at 7-8 (10th Cir. Mar. 18, 2011) (citing *Competitive Carrier First Report and Order* ¶¶ 46-54) (explaining that unlike firms with market power, firms lacking market power do not have the ability or incentive to price their services unreasonably or discriminate among customers unjustly in violation of Sections 201(b) or 202(a) of the Act); *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd. 3271, ¶ 4 (1995) (same).

[41] *See, e.g., Phoenix Order* ¶ 37 (explaining that "the Commission's market power analysis [i]s designed to identify when competition is sufficient to constrain carriers from imposing unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, and conditions").

[42] *See, e.g., id.* ¶ 42 & n.144.

1. Facilities Information.

The Commission proposes to collect data from incumbent LECs and competitive providers regarding the business customer locations to which they own or lease facilities that are capable of providing special access services.[43] This information will help the Commission measure competitive providers' share of the facilities that have been constructed to business locations and are being used, or can be used, to provide special access services. This facilities data will also respond to incumbent LECs' concerns that the FCC "lacks the data to make an informed decision about the full extent of competitive alternatives to [incumbent LEC] special access services."[44] Indeed, given that ownership of the only wire connection serving most commercial buildings forms the basis of incumbent LEC market power in the provision of special access services, information regarding the facilities owned and controlled by incumbent LECs and their competitors is central to the special access market analysis.

2. Information on Potential Competition.

The FCC proposes to collect information that can be used to assess the extent to which competitive providers will be able to efficiently construct new facilities to additional business locations in the future. This includes data from competitive providers such as (1) the criteria

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[43] *See, e.g., Special Access Data Collection Order*, Appendix A, Questions II.A.3-5 (requesting that competitive providers submit information regarding the locations to which they own or lease facilities that can be used to provide special access services and maps of those facilities); *id.*, Question II.A.7 (requesting that competitive providers submit information regarding the wire centers in which they are collocated); *id.*, Questions II.B.2-3 (requesting that incumbent LECs provide information regarding the locations to which they own or lease facilities that can be used to provide special access services). Gathering facilities information at the building level is necessary because the FCC has found that "[c]ompetition in the provision of special access appears to occur at a very granular level—perhaps as low as the building/tower." *Special Access Data Collection Order* ¶ 22.

[44] *See, e.g.*, AT&T Reply Comments at 39-40; *see also id.* at 52 (asserting that the Commission "does not yet have the data necessary to determine the ILECs' market shares").

(known as "business rules") they use to determine whether to construct facilities to a location;[45] (2) maps of their existing fiber networks;[46] and (3) the business rules they use to determine whether to submit a bid in response to a request for proposal ("RFP").[47] The Commission also requests historical information regarding competitive providers' construction of new facilities at a sample of locations, which will "help [the Commission] understand how competitive facilities are deployed over time and whether the presence of competitive facilities in fact provides a threat of competitive entry in nearby or adjacent areas."[48] Collecting this type of information, which indicates the extent to which incumbent LECs face potential competition in the relevant geographic and product markets, will address incumbent LECs' demands that the FCC "look not only at the competitive alternatives available to customers today, but also at new sources of supply that competitors have planned or that are likely to become available going forward."[49]

3. Pricing Information.

a. Contrary to AT&T's Claims, the Requested Pricing Information is Necessary.

The FCC proposes to collect information about the prices that incumbent LECs and competitive providers charge for special access services at retail and wholesale and the volume

[45] *See Special Access Data Collection Order*, Appendix A, Question II.A.8.

[46] *See id.*, Question II.A.5.

[47] *See id.*, Question II.A.11.

[48] *Special Access Data Collection Order* ¶ 34.

[49] Comments of Verizon, WC Dkt. No. 05-25, at 3 (filed Feb. 11, 2013) ("Verizon Comments"); *see also Special Access Data Collection Order* ¶ 48 ("[W]e agree with commenters who argue that to understand the impact of competition for special access, it is important to grasp the effects of potential, as well as actual, competition.").

of special access services they sell at those prices.[50] AT&T contends that the collection of this pricing information is unnecessary. More specifically, AT&T asserts that only facilities information, not pricing information, is needed because the FCC's only goal in this proceeding is to revise its pricing flexibility rules for traditional DS1 and DS3 special access services.[51] Under those rules, incumbent LECs have been able to obtain partial or full relief from price cap regulation of their DS1 and DS3 special access services where they have satisfied certain competitive triggers.[52] These triggers are based on proxies for facilities-based competition, rather than evidence that competitive carriers actually constructed their own facilities to business customer locations in those areas.[53] According to AT&T, the only task at hand is for the Commission to determine the effectiveness of these pricing flexibility regulations and come up

[50] *See Special Access Data Collection Order*, Appendix A, Questions II.A.12-14 (requesting that competitive providers submit information regarding the prices that they charge their customers for special access services); *id.*, Questions II.A.15-16 (requesting that competitive providers submit information regarding their revenues from the sale of special access services); *id.*, Questions II.B.4-6 (requesting that incumbent LECs provide information regarding the prices that they charge their customers for special access services); *id.*, Questions II.B.8-11 (requesting that incumbent LECs provide information regarding their revenues from the sale of special access services); *id.*, Question II.B.7 (requesting that incumbent LECs provide information regarding the type of rate regulation (*e.g.*, price cap, "Phase I" pricing flexibility, "Phase II" pricing flexibility) that applies to each wire center in which they sell special access services); *see also id.*, Question II.D.2 (requesting that all providers submit information regarding where their rates are recorded (*e.g.*, in tariffs or in documents that are not publicly available)). To ensure that the pricing information it collects accurately reflects the prices that are actually being paid in the marketplace, the Commission asks purchasers of special access services to report pricing information as well. *See id.*, Questions II.F.2-7 (requesting that purchasers of special access services report information regarding their special access expenditures). The Commission also requests information on adjustments, rebate, or true-ups that may affect the prices ultimately paid by purchasers. *See id.*, Question II.A.13; *id.*, Question II.B.5.

[51] *See* Paperwork Reduction Act Comments of AT&T Inc., WC Dkt. No. 05-25, at 19-20 (filed Apr. 15, 2013) ("AT&T April 2013 PRA Comments").

[52] *See Pricing Flexibility Triggers Suspension Order* ¶ 11.

[53] *See id.* ¶ 29.

with workable proxies for facilities-based competition.[54] But that is not, and has never been, the FCC's only goal in the special access rulemaking proceeding.

Since it began in 2005, this proceeding has always encompassed reform of not only the Commission's pricing flexibility regulations for DS1 and DS3 special access services but also the agency's price cap regulations for special access services. As the FCC has explained, when it opened this proceeding in 2005, it "initiated *a broad examination of what regulatory framework to apply to [incumbent] LECs' interstate special access services*"[55] and sought comment on "traditional price cap issues" as well as the special access pricing flexibility rules.[56] Consistent with this "broad examination," in 2009, the Bureau again requested comment on the effectiveness of both "the current price cap and pricing flexibility rules" in ensuring just and reasonable rates, terms, and conditions for special access services.[57] And in the *Special Access Data Collection Order and FNPRM*, the Commission expressly contemplates "modifying or updating [its] price cap rules."[58]

Furthermore, the FCC's special access rulemaking proceeding has never been limited to regulation of traditional DS1 and DS3 services. When it opened this proceeding, the Commission explicitly sought comment on "the proper regulatory treatment of [packet-based]

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[54] AT&T April 2013 PRA Comments at 20-21.

[55] *Special Access Data Collection Order* ¶ 8 (emphasis added); *see also Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking*, Public Notice, 22 FCC Rcd. 13352, at 1 (2007).

[56] *2005 Special Access NPRM* ¶ 4.

[57] *Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, Public Notice, 24 FCC Rcd. 13638, at 13639 (2009); *see also id.* at 13642-43.

[58] *Special Access Data Collection Order and FNPRM* ¶ 88.

services."[59] And since then, the FCC has (1) invited comment on the regulation of packet-based special access services,[60] and (2) solicited the voluntary submission of data regarding packet-based special access services.[61]

Thus, the FCC's goal in this proceeding is not merely reform of its pricing flexibility rules for DS1 and DS3 special access services. Rather, the Commission's fundamental objective is to ensure that rates (as well as terms and conditions) for all types of special access services are—consistent with Sections 201 and 202 of the Act—just and reasonable and not unjustly or unreasonably discriminatory.[62] Information on the prices that incumbent LECs and their competitors charge for special access services is clearly necessary to perform this core function.

It is particularly important that the Commission collect pricing (as well as terms and conditions) information on incumbent LECs' packet-based special access services (*e.g.*, Ethernet services) because the vast majority of those services have been largely deregulated.[63] As a result, the Commission often lacks the most basic information regarding the rates, terms, and conditions on which incumbent LECs offer Ethernet and other packet-based special access services relative to competitive providers. And the FCC is therefore frequently unable to assess

[59] *2005 Special Access NPRM* ¶ 52.

[60] *Wireline Competition Bureau Seeks Comment on Petition to Reverse Forbearance From Dominant Carrier Regulations of Incumbent LECs' Non-TDM-Based Special Access Services*, Public Notice, 28 FCC Rcd. 1280 (2013).

[61] *See Competition Data Requested in Special Access NPRM*, Public Notice, 26 FCC Rcd. 14000 (2011).

[62] *See FCC Supporting Statement* at 5.

[63] *See* Petition to Reverse Forbearance at 9-18 (describing how the FCC eliminated the dominant carrier pricing and tariffing obligations applicable to the packet-based special access services offered by Verizon, AT&T, legacy Embarq, Frontier, and legacy Qwest).

incumbent LECs' implausible claims that they face sufficient competition[64] to ensure that these rates, terms, and conditions are just and reasonable as required under Sections 201 and 202 of the Act.

The pricing information the FCC proposes to collect "will allow comparisons of different providers' prices, after controlling, where necessary, for differences in cost-causing factors"[65] (*e.g.*, sales volume).[66] For example, the Commission will be able to compare incumbent LECs' wholesale prices for Ethernet and other packet-based special access services with (1) competitive providers' wholesale prices for the same services, and (2) incumbent LECs' and competitive providers' retail prices for those services. In addition, the FCC will be able to benchmark incumbent LECs' prices for traditional DS1 and DS3 special access services against the cost-based prices for the DS1 and DS3 services that incumbent LECs sell as so-called "unbundled network elements." By making such comparisons, the Commission will be able to determine whether incumbent LECs are exercising market power by charging special access prices that are unjust, unreasonable, or unjustly or unreasonably discriminatory in violation of Sections 201(b) and/or 202(a) of the Act.

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[64] *See, e.g.*, Letter from Linda Vandeloop, Director-Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, Attachment, at 6-7 (filed Apr. 27, 2012) ("The Ethernet Marketplace is Intensively Competitive and Became Even More So in 2011[.]"); Comments of Verizon, WC Dkt. No. 05-25, at 11 (filed Feb. 11, 2013) ("Competition for Ethernet services . . . constrains pricing for traditional special access.").

[65] *Special Access Data Collection Order* ¶ 36.

[66] *See id.* ¶ 38 (stating that "among other things, sold or purchased volumes and volume density are a key driver of special access costs").

b. Contrary to AT&T's Claims, the Requested Pricing Information Will Have Practical Utility.

It is clear that the pricing information in the proposed collection will be practically useful to the Commission. AT&T insists that the opposite is true, but none of AT&T's claims have merit. *First*, AT&T claims that the FCC is proposing to collect "by circuit" special access prices that "simply do not exist."[67] According to AT&T, this is because lump sum or contract-wide discounts, credits, and adjustments cannot be allocated to individual circuits.[68] But the proposed collection does not require AT&T or any other provider to allocate a lump sum discount among the circuits to which it applies. Rather, the collection merely asks providers to indicate whether each circuit sold is associated with a lump sum or contract-wide discount, credit, or adjustment.[69]

Furthermore, AT&T's own special access discount offerings belie its claim that "by circuit" prices do not exist. For example, under AT&T's Area Commitment Plan ("ACP"), AT&T provides discount credits "at the circuit level" to customers that commit to purchasing a specified volume of special access circuits.[70] It initially bills these customers at its undiscounted special access rates. Then, at the end of each month, AT&T provides them with a discount credit for each circuit purchased under the ACP (and this discount credit is equal to the difference

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[67] AT&T April 2013 PRA Comments at 14.

[68] *See id.* at 14-15.

[69] *See Data Collection Implementation Order*, Appendix A, "Instructions for Data Collection for Special Access Proceeding," at 30 ("*If the adjustment applies to multiple circuit elements and/or circuits, provide the total dollar amount of the billing adjustment*, and include an Adjustment_ID for each circuit element reported . . . that can be used to link the billing adjustment . . . with the appropriate circuit elements.") (emphasis added); *id.* at 48 (same).

[70] *See* BellSouth Telecommunications, Tariff F.C.C. No. 1, § 2.4.8(B). AT&T offers this plan to special access customers in the geographic region that was served by BellSouth prior to AT&T's acquisition of BellSouth (*i.e.*, in the southeastern U.S.).

between the undiscounted rate for the circuit and the lower "ACP rate" for the circuit).[71] Thus, if AT&T reports the price initially billed and the discount later awarded for each of these circuits, as requested in the proposed data collection, the FCC can readily determine the "by circuit" discounted price. This is so for circuits sold under the ACP and similar discount offerings.

Second, contrary to AT&T's suggestions, OMB's disapproval of the information collection proposed in the FCC's emergency backup power proceeding is irrelevant. In that case, OMB found that the Commission had not demonstrated the practical utility of the proposed collection given "the expected volume of submitted reports" and "the non-standardized format the information will be submitted in."[72] There, the FCC failed to provide any kind of format whatsoever for submission of the requested reports. As one carrier explained, if the information collection had been approved, the agency would have been "deluged with thousands of pages of information," and each respondent could have submitted such information "in a unique format and accompanied by a variety of divergent and potentially unwieldy attachments."[73] By contrast, here, the FCC has proposed collecting all of the requested pricing data in a standardized electronic format that will allow its staff to review, analyze, and make pricing comparisons using

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[71] *See id.* For example, a customer that makes an ACP volume commitment for 49-72 months qualifies for a rate of $120.00 (the ACP rate) rather than $168.00 (the undiscounted rate) for a DS1 local channel in a geographic area that AT&T has designated as "Zone 1." *See id.* § 7.5.9(A)(1). Such a customer is initially billed $168.00 for each of these circuits but later receives a billing credit equal to $48.00 for each of them at the end of each month.

[72] Notice of Office of Management and Budget Action, *Information Collection Regarding Emergency Backup Power for Communications Assets as Set Forth in the Commission's Rules*, ICR Ref. No. 200802-3060-019 (Nov. 28, 2008).

[73] Comments of T-Mobile, USA Inc. on Information Collection Requirements, *Information Collection Regarding Emergency Backup Power for Communications Assets as Set Forth in the Commission's Rules*, at 18 (filed Oct. 9, 2008), *available at* http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=200802-3060-019.

the information.[74] In fact, the agency rejected calls from cable operators to simply submit their internal billing records precisely because the uploaded automated records of "different companies and industry sectors [that] record billing [information] differently . . . would be unintelligible."[75]

Third, AT&T asserts that the pricing information the FCC gathers will become outdated by the time it is analyzed because of "rapid changes in the special access marketplace."[76] While business customers' demand for Ethernet services is rapidly increasing, there are in fact no "rapid changes" in the special access market that will render the collected pricing data useless. As the FCC has recognized, competitive carriers still face the same high economic and operational barriers to construction of their own last-mile facilities as they did in 1996.[77] Accordingly, there is no basis for concluding that there will be such a rapid increase in price-constraining competition so as to render all of the pricing information gathered worthless.

Finally, AT&T's own statements in the special access rulemaking belie its claim that the FCC should not collect pricing data. For instance, in August 2010, AT&T told the agency that "the FCC cannot determine if there is a need to modify the [special access] rules and, if so, how until it gathers data," including "*[a]ctual transaction prices*."[78] Similarly, in March 2012, AT&T complained that some competitive providers had not responded to the FCC's second

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[74] *See FCC Supporting Statement* at 16.

[75] *Id.*

[76] *See* AT&T April 2013 PRA Comments at 6.

[77] *See Phoenix Order* ¶ 84 ("We see nothing in the record to indicate that, in the years since the passage of the 1996 Act, these barriers have been lowered for competitive LECs . . . ."); *id.* ¶ 90.

[78] Letter from Frank S. Simone, Assistant Vice President – Federal Regulatory, AT&T Services Inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, Attachment, at 2 (filed Aug. 4, 2010) (emphasis added).

voluntary data request, "which sought pricing and related information," and it urged the Commission to issue a mandatory information collection to ensure that it has a "complete picture of marketplace conditions."[79] Now, AT&T urges the FCC to remove all pricing data from the proposed collection. AT&T cannot have it both ways.

4. Terms and Conditions Information.

The Commission proposes to collect information about the terms and conditions under which incumbent LECs and competitive providers sell their special access services.[80] These terms and conditions include requirements that customers satisfy certain volume and term commitments in exchange for discounts and other benefits. This data will allow the FCC to properly account for such discounts and benefits when analyzing the special access pricing information that it collects. This information will also help the Commission measure the level of demand elasticity in the relevant geographic and product markets because the terms and conditions on which incumbent LECs offer special access services affect a purchaser's ability to switch from the incumbent LEC to another provider of special access services.[81]

Additionally, the collection will assist the Commission in studying the harms to competition caused by the exclusionary terms and conditions on which incumbent LECs offer special access services. This inquiry is central to identifying the circumstances in which such

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[79] Letter from David L. Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 1, 11 (filed Mar. 28, 2012).

[80] *See Special Access Data Collection Order,* Appendix A, Questions II.A.17-19 (requesting that competitive providers report information regarding the terms and conditions pursuant to which they sell special access services); *id.*, Questions II.B.12-13 (requesting that incumbent LECs report information regarding the terms and conditions pursuant to which they sell special access services); *id.*, Questions II.F.8-14 (requesting that purchasers of special access services provide information regarding the terms and conditions pursuant to which they purchase such services).

[81] *See Special Access Data Collection Order* n.76.

terms and conditions violate Section 201(b) of the Act. In particular, while the Joint Commenters and other purchasers of special access services have provided extensive and dispositive proof that the terms and conditions in incumbent LEC special access purchase arrangements harm competition by locking up demand,[82] the incumbent LECs insist that these terms and conditions are reasonable.[83] To the extent that the Commission believes it lacks sufficient information to evaluate the incumbent LECs' claims, collecting information on special access terms and conditions will assist the FCC in doing so.

B. The FCC's Burden Estimate is Generally Accurate.

In the *PRA Notice*, the FCC seeks comment on whether its revised average hourly burden estimate of 146 hours is accurate.[84] Most of the Joint Commenters find this burden estimate to be fairly accurate. For instance, tw telecom has estimated that it would take roughly between 115 and 130 hours to respond to the information collection. This estimate includes time to gather the requested information from tw telecom's systems, supplement and "scrub" that data, supply the requested network maps, provide the requested latitude and longitude information, and provide narrative responses to the questions posed in the data collection that require such a response. Similarly, BT has found that it would take between 100 and 120 hours to respond to

[82] *See supra* note 22. As the Joint Commenters explained in their April 2013 PRA Comments, the Joint Commenters do not believe that further data collection is required for the FCC to provide immediate relief from incumbent LECs' exclusionary, lock-up special access purchase arrangements. *See* Comments of BT Americas, Cbeyond, EarthLink, Integra, Level 3, and tw telecom, WC Dkt. No. 05-25, n.7 (filed Apr. 15, 2013). To the extent that the Commission disagrees with this assertion, however, collecting the information discussed herein is necessary to determine how best to address incumbent LEC exclusionary conduct in the provision of special access services. *See id.*

[83] *See, e.g.*, Verizon Reply Comments at 18-28; CenturyLink Reply Comments at 17-30.

[84] *See PRA Notice* at 73861.

the data collection, and Cbeyond has found that the FCC's revised estimate is a reasonable approximation.

Some of the Joint Commenters' burden estimates are higher than that of the FCC. For instance, Integra has determined that it would take roughly 260 hours to respond to the data collection. In addition, EarthLink has estimated its burden to be roughly 320 hours in part because EarthLink has made seven acquisitions since December 2010, and the relevant data associated with each acquired entity is still being integrated onto a single operations support system.

In all events, the overall burden posed by the special access information collection is substantially lower than that claimed by the largest incumbent LECs. Indeed, Verizon's preliminary estimate of more than 15,000 hours[85] appears to be designed solely to bolster its advocacy against employing a market power analysis in this proceeding.[86] And, in light of the estimates provided above, CenturyLink's estimate of "about 40,000 hours"[87] to respond to the special access information collection hardly seems credible.

Furthermore, AT&T overstates the burden of submitting the requested pricing information. AT&T admits that for most of the pricing questions, it can compile and gather the requested information by running mechanized queries in its existing databases.[88] In addition, as

[85] *See* Letter from Maggie McCready, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 3 (filed Oct. 2, 2012).

[86] *See, e.g.*, Verizon Reply Comments at 2 (urging the FCC not to rely on a market power framework to analyze special access competition); *id.* at 8-12 (describing "factor[s] weighing against the use of a market power analysis").

[87] Letter from Melissa E. Newman, Senior Vice President, Federal Policy and Regulatory Affairs, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25 (filed Jan. 10, 2013).

[88] AT&T April 2013 PRA Comments at 22.

discussed above, the FCC is not proposing that AT&T and other providers allocate their lump sum or contract-wide discounts, credits, and adjustments to individual circuits—the main source of AT&T's complaints.[89]

C. The FCC Has Significantly Reduced the Burden of the Collection to the Extent Practicable and Appropriate.

Under the PRA, the collection must "reduce[] to the extent practicable and appropriate the burden on persons who shall provide information to or for the agency, including . . . small entities."[90] The FCC has met that requirement here. In fact, the Bureau made as many as 37 modifications in the *Data Collection Implementation Order* to significantly reduce the potential burden on respondents.[91] These modifications include the following:

- Eliminating the requirement to report the "location type" of a given location if it is unknown and allowing competitive providers to obtain longitude and latitude information from a known geocoding platform, thereby eliminating the need for these providers to conduct costly site visits to those locations.[92]

- Clarifying the mapping obligation and effectively eliminating the need to report "the exact location of fiber on the street," further reducing the need for site surveys.[93] The FCC also stated that it does not intend to penalize respondents "who undertake reasonable, good faith efforts to identify the routes and paths traversed by fiber."[94]

- Allowing competitive providers to report information on the location of their network nodes and the year they went "live" from a database widely used in the industry, thereby reducing the reporting burden on these providers.[95]

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[89] *See id.* at 7.

[90] 44 U.S.C. § 3506(c)(3)(C).

[91] *See* Opposition of Sprint Corporation to the National Cable & Telecommunications Association's Application for Review, WC Dkt. No. 05-25, at 3 (filed Dec. 24, 2013).

[92] *See Data Collection Implementation Order* ¶¶ 32-33.

[93] *See id.* ¶ 38.

[94] *Id.* n.101; *see also FCC Supporting Statement* at 13.

[95] *See Data Collection Implementation Order* ¶¶ 41-45.

- Clarifying that qualitative inquiries about the problems purchasers have experienced with terms and conditions are optional, thereby reducing the burden on smaller purchasers.[96]

In most of the instances where the FCC did *not* reduce the burden associated with the proposed collection, doing so would not have been "practicable" or "appropriate." For example, the Commission could not appropriately conduct a comprehensive evaluation of competition in the special access market if it did not collect any information from small providers or if it collected information on only a sample of geographic areas. This is because the agency has found that competition in the provision of special access services "appears to occur at a very granular level – perhaps as low as the building/tower"[97] and thus, "even a very small provider can have a large effect on a local market if its competes to serve an office park or central business district."[98] In addition, the FCC could not permit competitive providers to submit "whatever network maps they have."[99] This is because those maps would not be useful to the Commission's analysis if they (1) did not depict the provider's fiber networks at a sufficiently granular level (*i.e.*, the level of the connected location), or (2) were not in a standardized format.[100]

D. The Burden of the Information Collection is Justified by its Practical Utility.

In its *Supporting Statement* for the proposed collection, the FCC states that it "has decided that the benefit to the American public gained from reforming the Commission's special

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[96] *See id.* ¶ 52.

[97] *Special Access Data Collection Order* ¶ 22.

[98] *FCC Supporting Statement* at 6.

[99] *Id.* at 13.

[100] *See id.*; *see also Data Collection Implementation Order* ¶ 39.

access rules outweighs the burden of a large-scale data collection."[101] The Joint Commenters—all of whom face the burden of responding to the proposed collection—wholeheartedly agree. As discussed in Part II above, incumbent LECs' excessive special access prices have had far-reaching, harmful effects on the U.S. economy for more than a decade, and the Commission has repeatedly stated that it cannot address these harms until it has what it believes is a full evidentiary record. Nor can the FCC identify any markets which should be free of regulation without the requisite data.[102] For this reason, even CenturyLink—which anticipates spending *40,000 hours* on the information collection—has urged the FCC to "enforce its mandatory comprehensive data collection" to "obtain[] a useful and comprehensive data set."[103]

IV. CONCLUSION

For the foregoing reasons, OMB should approve the FCC's proposed special access information collection.

Respectfully submitted,

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[101] *FCC Supporting Statement* at 11.

[102] *See Special Access for Price Cap Local Exchange Carriers*, Report and Order, 27 FCC Rcd. 10557, ¶ 104 (2012) (stating that "*once [it has] performed a broader evaluation of competitive conditions*, . . . the Commission may ultimately conclude that it is appropriate to grant regulatory relief") (emphasis added).

[103] Comments of CenturyLink, Inc., WC Dkt. No. 05-25, at 6, 8 (filed Feb. 11, 2013).